No. 1455

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN DISTRICT OF CALIFORNIA

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS, and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants in Error.

Oral Argument of W. H. Metson, Esq., on Behalf of Plaintiffs in Error.

PRESS OF THE JAMES H. BARRY CO.
213-214 LEAVENWORTH ST.

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MR. METSON—May it please the Court, the controversy in this case is between a creek claim called No. 6 Above Discovery on Dome Creek (Dome Creek flows from east to west) and a bench claim which was intended to be located northerly of and parallel to this Dome Creek line, on the right limit thereof. This involved an overlap between the two claims of about one and three-quarters acres.

The location notice of Creek Claim No. 6 Above Discovery on Dome Creek and the marking of the same on the ground were made in September, 1902, as claimed by the defendants in error. Our location was made in May, 1904, nearly two years thereafter, by marking the ground and staking a bench claim apparently overlapping the creek claim of our opponents. The real controversy herein revolves around the sluice-box made by nature in this overlapping fraction. The hidden channel, the underground riffle, is there, and naturally we both want the gold. The creek claim was located and nothing was done by defendants thereon after the marking of the boundaries. No work was done thereon in 1903, excepting assessment work. Nor was any work done in 1904, 1905 or 1906 except assessment work.

On the contrary, we had a cabin on our bench claim from September, 1904, and were working there sinking holes and doing certain discovery work until in April, 1905, when in one of these holes, in what would be the natural ground sluice of the claim, we discovered coarse gold. Shortly after that our opponents came out and we showed them the gold that we had found in the underground riffles, a matter of very rich gravel. After having thus shown them this coarse gold, the locators of the creek claim came out later on the ground and blazed out the alleged lines of their claim, taking in our ground.

The location notice of Funchion calls for 20 acres. The testimony of defendants in error is that they went up stream and located their initial center stake by cutting off a tree and marking it as being the upper end center of No. 6 on Dome Creek. This would be at point "H" on the map, Plaintiffs' Exhibit "B." On this stake they claimed 1320 feet down stream and 660 feet wide. So *they* say. Our witnesses testified, however, that the markings on the lower center stake, point "E" on the map, were 1320 feet up stream by *330* feet on each side thereof.

Now, when we located in May, 1904, nearly two years thereafter, we found this lower center stake. We followed a trail from this center stake northerly, and after stepping off about *345* feet we found a stake with some markings thereon which were not clear, but which we understood to be the northwest corner stake of their claim, and we therefore established our location post a few feet therefrom.

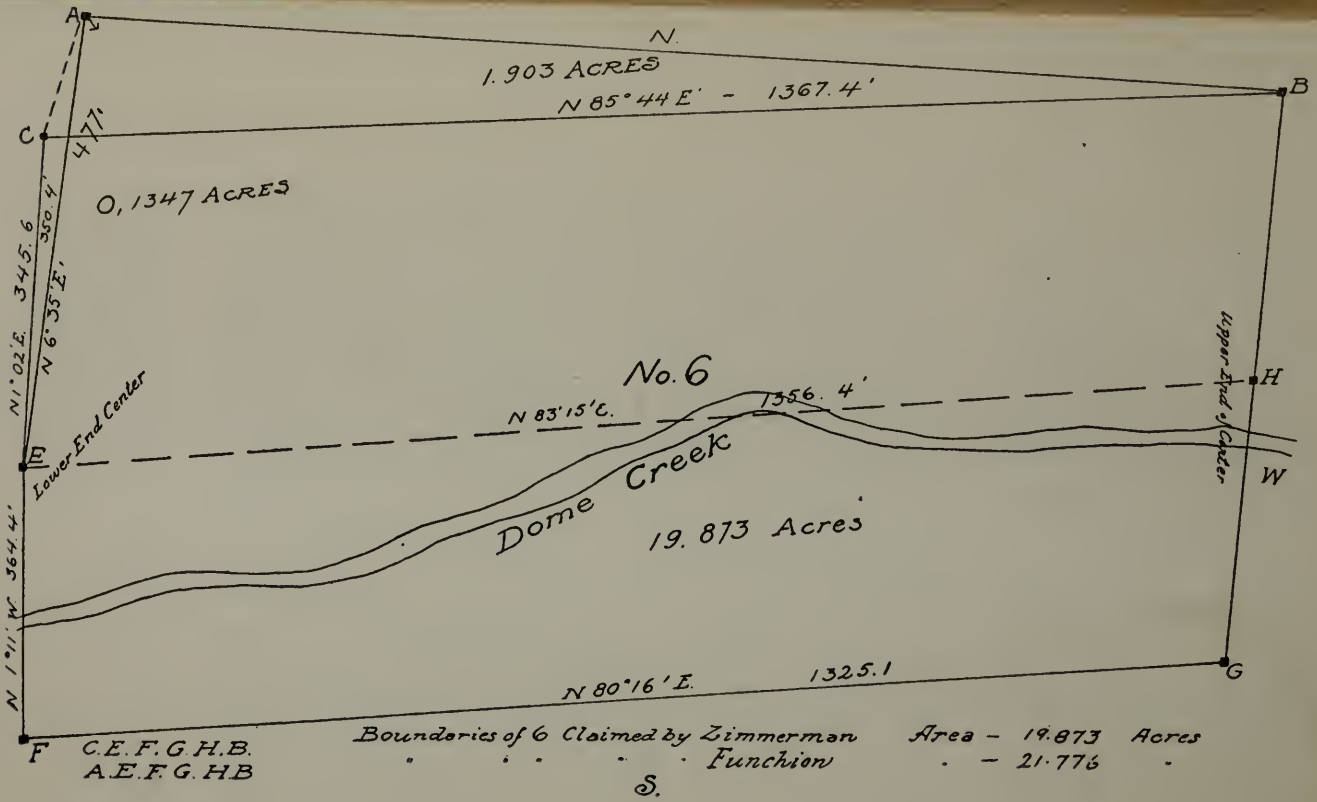
Now, when they re-marked the creek claim in 1905 after we had shown them the coarse gold that we had discovered in the ground sluice as I call it, they *then* blazed a line from this center stake to what they claim is the northwest corner of the creek claim, some *477* feet distant instead of *330* feet. This is at the place marked "A" on Plaintiffs' Exhibit "B." Now, the point in this case as I see it is this: Measuring up from this 345 foot stake and around the creek claim as shown, our opponents have an excess of one and three-quarters

acres over the twenty acres allowed by section 2331 of the Revised Statutes of the United States. Our contention is, therefore, that inasmuch as they were *not* mining on this excess, that we had a right to and did cut it off; that they have no title to this one and three-quarters acres which contain the hidden underground channel and which, by the efforts of our people we have succeeded in developing.

Immediately after making our location the record shows that our opponents were aware of the fact and continued to be aware of our claim regarding the 345 foot stake at point "C," being their northwest corner, down to the time of commencing litigation. But they did not attempt to draw in their lines so as to include this one and three-quarters acres comprising a part of our location until after they had commenced this action, when they cut off a strip on the southerly end of their claim so as to reduce their location to the proper statutory size, asserting their right to the fraction included in our claim.

We here insert a little diagram which may assist the Court in arriving at an understanding of the relative situation of these locations.

Now, your honors will observe that this triangular piece on the northerly side of the creek measured up about one and three-quarters acres. The stakes at points A and C make this clear. Measuring from the 345 foot stake to the 477 foot stake, and the distance practically makes the excess which they have excluded


A
N.
1.903 ACRES
N 85° 44 E' - 1367.4'
B
C
471'
0,1347 ACRES
N 1° 02'E. 345.6
N 6° 35'E. 350.4'
No. 6
N 83° 15'E.
1356.4'
H
E
Lower End Center
Upper End of Center
W
Dome Creek
19.873 Acres
N 1° 11' W 364.4'
N 80° 16' E. 1325.1
G
F
C.E.F.G.H.B.
A.E.F.G.H.B
Boundaries of 6 Claimed by Zimmerman Area - 19.873 Acres
" " " " Funchion " - 21.776 "
S.

at the other end, and about which this controversy arises. The court below has given our opponents the excess on which we are working. We contend this was error.

The case of *Price* vs. *McIntosh,* reported in 121 Fed., p. 716, and which was decided by this Court,, involved a somewhat analogous question, excepting that there the *facts* were vitally different. It was held by this Court in that case that where a man had made a mining location in excess of the statutory area, *and was working the excess,* had found the underground channel, *was in the actual occupancy thereof, mining it,* he could not be deprived of the particular hole in which he was working because of such excess, by reason of some subsequent locator coming along and floating or swinging over his actual workings for the purpose of grabbing the underground channel of the man who had developed it. That the original locator under these circumstances could elect what part of the excess he would throw off, and that being in the actual possession of the excess diligently working the same was a sufficient election.

But this is a dissimilar case. Here the man who innocently made this overlap (if it be one) made it upon an unoccupied location which, if valid otherwise, contained one and three-quarters acres in excess of the area allowed by law. We claim that inasmuch as there was no occupancy—our opponents being many miles off in another part of Alaska—that we had the right to take

the excess of this ground as it appeared to us from the markings on the ground.

In other words, that the burden was not on us to "mush" over that creek or throughout the district to find the man who had located the creek claim, inform him of his excessive area, and ask him to cut off his excess so that we might locate it.

Federal Courts have endeavored to so construe the law as to do equal justice between different locators, and in so doing they have naturally defended and protected that man who has found the channel and is actually working it as against some selfish person who comes along subsequently and tries to take advantage of the situation, claiming that the portion where the first locator is actually working is the excess. This is an entirely different case, as we have shown.

Still there should be some limitation, for a man might stake out 21¾ acres and hold it as against all others. Now if locations containing 21¾ acres are going to be protected by the courts, then locations of twenty-five, thirty or forty acres will have to be. Where are the courts going to draw the line in the face of section 2331? The statute says placer claims shall contain only twenty acres for each individual. Where are the courts going to draw the line as to the excessive area that may be staked off by the *non-occupant* and *non-worker,* so that he can claim the excess as in this case, after he has stood by and somebody else has found and developed the pay channel? Are they going to draw the line

against the man who acts in good faith and diligently works his claim, and strike him who has found the gold and developed the ground, rather than he who simply locates, not in conformity to the statute, but marks excessive boundaries and then goes away therefrom?

Assume this state of facts. Assume that our opponents located this ground in controversy, and then came out of Alaska and came here to California. Assume that we made our location, went ahead and developed the ground in good faith, relying upon the stake in controversy here being the other side's northwest corner (stake "C," the 345 foot stake). Then, after we had discovered the channel and developed the ground, they come back to Alaska and claim a right to the location and that they are entitled to take this excess and cut it off where they choose and say they are going to hold the channel and they will give us a portion somewhere else across their claim from ours. That would be the situation. Would that be justice? Can it be law?

On the contrary, I take it that the true rule of law is that if a party is actually in possession of such excessive area, working the ground and developing the channel, and signifies his intention of holding this ground and working it actively and energetically, he ought to be allowed, and the law does allow him, to hold it as a part of his location. On the other hand, if he does not do that, he is the loser.

Counsel has indulged in a little sarcasm at our expense in his brief, upon this question, and says that we

do not contend for the Montana rule, that we are generous, and so forth. We have presented this matter as we think and understand the law to be. We believe the consensus of authority to be that the excess is void and that the whole location is not void. Under the Montana rule, if a man located a claim that was larger than the amount allowed by law, the whole claim was void. The rule in the Federal Courts appears to be that the location is void as to the excess, and the rule in the *Price-McIntosh* case was that the man who was in the *actual* possession of the property would have the right to say what portion of the over-lap should be taken off.

However, in connection with the argument I am making, I would like to read from the case of *Hauswirth* vs. *Butcher,* which was a Montana case, and wherein the Montana doctrine was invoked. I do not contend this is not a harsh doctrine, but the reasoning of a part of the opinion is applicable to my argument here. I will read from page 716, 1 Pac. Rep.:

> "As to the length of a mining claim, there must be a substantial compliance with the law, as there must in all other respects pertaining to the location. The claim in question, as shown by the stakes and boundaries thereof, is 2000 feet in length, whereas the greatest length as authorized by law is 1500 feet. If such a location could be sustained to the extent of 1500 feet where the rights of third persons had not intervened, which we do not decide, cer-

tainly if such rights had attached such a location would not protect 500 feet in length of claim more than the law authorizes by virtue of one discovery. A 1500-foot claim cannot be shifted from one end to the other of a 2000-foot claim as circumstances might require to cover the discovery of a third person within such 2000 feet location. . . . 'The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. The provisions of the law designed for the attainment of this object are most important and beneficent and they ought not to be frittered away by construction.' "

It was held in that case that where a man marked a claim of 2000 feet he could not even hold 1500 feet, because the whole thing was void. And the court can readily see that if a locator is only entitled to 1500 feet, but still marks off 2000 feet, he could slide this way or that way, as the situation might disclose ore or chutes of ore might be developed in the ledge by other people, and in that manner be within the limit of 2000 feet, electing at any time to take out of it a 1500 foot claim.

So it is with a placer mining claim. If a man had 21¾ acres marked out as being available, and did not primarily declare himself and cut off the excess, then if some party comes along, takes that excess and locates

it (as we did here two years after Funchion had let his location sleep) then that party would be entitled to such excess. That is our argument on this point in the case.

There are some other circumstances with reference to our taking the 1¾ acres here. It is in evidence that after we had shown our opponent the coarse gold, which we had found, he went on the ground and effaced the markings on this stake "A," claiming it was his stake, and placed new writings on it. When we went there in 1904 we had found this lower center stake, claiming 1320 feet up stream and 330 feet on each side thereof, and after stepping off 345 feet in a northerly direction we also found the stake at point "C," mildewed and with some obscure markings on it. A month later we found the 477 foot stake at "A," on which was a notice signed by a man by the name of McQuillan, and also markings indicating that it was the corner of Bench Claim No. 5 Below. Now, then, this stake "A" is the stake that our opponent, after finding we had made a "strike," decided was his, claimed his writings had become obliterated, effaced the writings thereon, and marked it as his northwest corner stake. But inasmuch as he marked his boundaries 1¾ acres in excess, it seems to me that the court below should have taken that into consideration. However, it did not, and we are here relying upon the law as to what a court may or will do with reference to this excess.

In closing I would like to say a word or two in reference to one or two statements in the argument of counsel for the defendants in error. I certainly feel that my learned friend has been overworked, because he is mistaken in these statements.

He asserts that "the case of *Richmond* vs. *Rose* has "been cited and considerable comment made upon it in "the brief for plaintiffs in error as to one expression "used in that case, and with your Honor's permission "I will read the paragraph that they have referred "to."

We have not *even cited* the case of *Richmond* vs. *Rose* in our brief or in our opening argument, although said case is in line with our argument. That was a patent case, as we understand it, and the Supreme Court held, as we have admitted should be the correct rule of law in our briefs and here, that the fact that a locator had staked a claim in excess of the amount allowed by law did not render the claim *entirely void,* but only as to the *excessive* area. The Supreme Court further held that when patent was applied for on such a location, the Government would exclude the excess, issuing a patent for the balance of the location. The facts of that case were entirely different from the circumstances of this case, for there the element of occupation and mining on the excess by either party was not shown and did not enter into a determination of the case.

Again counsel says in his brief (page 4), and repeats in his argument to this Court now, referring to

the testimony of Hatton, witness for plaintiffs in error, that after the conclusion of the testimony offered in the case, the court having confidence in Mr. Hatton and in Mr. Wilson, who was a witness for our opponents, and believing they both desired to tell the truth, asked them to go out and examine the stake claimed by us to be the lower right hand corner stake of the Funchion claim. Now counsel says that Mr. Hatton came back and stated he had been mistaken in his original testimony. He says (see his brief, p. 4) that Hatton, who had previously testified that said lower right hand corner stake was located at the point marked "C" on said Exhibit "B," admitted, on reporting to the Court, that he was mistaken and that such lower right hand corner stake was situated at the point claimed by the defendants in error, namely at "A" on said Exhibit "B."

I assert that counsel is mistaken also as to that. The testimony of Mr. Hatton at the trial was with reference to the marking on the *345* foot stake. Now, that was in 1904—his testimony was with reference to what he had seen there in May, 1904. The trial was in 1906, in the Fall, and he went out on the ground at that time at the request of Judge Wickersham, and when he came back he did *not* tell the Court that he was mistaken as to the lower right hand corner of the Funchion claim, as counsel state, but he told the Judge that the writing was then so dim that it was impossible to read it, and he could not, at that date, read what the writing was on the 345 foot stake. Your Honors will look at the testi-

mony in this respect, found at page 272 of the transcript.

Now, as to one other matter. My contention is that the court below made a mistake. It is immaterial what the testimony showed as to the inscription on those upper and lower center end stakes; whether one claimed 330 feet on each side thereof, and the other 660 feet wide. The same conclusion should have been reached by the court below, and should be reached by this Court, namely, that they were entitled to *but* three hundred and thirty feet on *each* side. I will read the location notice, which is one of the elements that go to mark the boundaries, and which should contain a more definite description thereof than the posted notice as has been held by this Court in the case of *Gird* vs. *California Oil Co.*, 60 Fed., p. 531.:

> "Notice is hereby given that the undersigned has located twenty acres of placer mining ground on Dome Creek in the Circle recording district, District of Alaska, described as follows: Commencing at a stake bearing location notice and adjoining No. 7 Above Discovery; thence down stream a distance of 1320 feet to a stake; thence 660 feet in width of said claim. This claim to be known as No. 6 Above Discovery on Dome Creek. Located this 18th day of September, 1902. John C. Ross, by his attorney, James Funchion" (Tr., 31).

It will be noted that the notice designates the two center stakes but no other stakes are mentioned therein.

There is a conflict in the testimony as to the stakes themselves bearing the figures 600 feet in width in accordance with the notice. Funchion, the man who located the claim, says he doesn't remember what was on the lower end stake, but that his recollection was that it was in accordance with the location notice read by Mr. Claypool. Mr. Wilson, who helped stake the claim, said he could not recollect what was on the stake. Our witnesses testified that on the lower end stake the inscription was 330 feet on each side of the stake, and Bush, their witness, testified to the same effect.

However, in my view of the law it is immaterial. In this respect I would like to call the Court's attention to the case or *Erhardt* vs. *Boaro,* 113 U. S., 528, and will read the location notice in that case, namely:

> "We, the undersigned, claim 1500 feet on this mineral bearing lode, vein or deposit. Dated June 17, 1880. Signed, Joel B. Erhardt, 4-5ths; Thomas Carroll, 1-5th."

The Court said in that case (page 533):

> "The written notice posted on the stake at the point of discovery of the lode or vein in controversy, designated by the locators as 'Hawk Lode,' declares that they claim 1500 feet on the 'lode, vein or deposit.' It thus informed all persons, subsequently seeking to excavate and open the lode or vein, that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite in not stating the

number of feet claimed on each side of the discovery point, and must, therefore, be limited to an equal number on each side, that is, to seven hundred and fifty feet on the course of the lode or vein in each direction from that point."

Now, if the Supreme Court of the United States is right in that case, and if the contention made by counsel be true, they have all they can claim, or are entitled to under that notice; 660 feet in width is as indefinite as 1500 feet was held to be in the Colorado case (*Erhardt* vs. *Boaro*). The amount claimed by them can be but three hundred and thirty feet on each side of the center stake, and we were right in assuming the *345* foot stake to be their northwest corner stake and in making our location in accordance with such assumption.